Supreme Court, U.S.
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No. 99-528

In The

Supreme Court of the United States

DAVID A. FIELDS, ROBERT P. WEISS and JACK D. STEWART,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF LABOR ADMINISTRATIVE REVIEW BOARD and FLORIDA POWER CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals deprived petitioners of due process by applying the substantial evidence standard of review, instead of the *de novo* standard of review, to an administrative tribunal's summary judgment which dismissed without an evidentiary hearing petitioners' "whistleblower" complaints against their employer, despite the existence of genuine issues of material fact concerning the employer's affirmative defense that petitioners "deliberately" caused a violation of nuclear regulatory requirements.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed, and there is no parent or subsidiary company required to be listed by S. Ct. R. 29.6.

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REASONS FOR ALLOWANCE OF THE WRIT

THE COURT OF APPEALS' DECISION CONCERNING AN IMPORTANT ISSUE IS IN CONFLICT WITH THE DECISIONS OF ITS SISTER COURTS AND THIS COURT, REPRESENTS A GROSS MISCARRIAGE OF JUSTICE, AND SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A DEPARTURE BY A LOWER TRIBUNAL, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Petitioners were parties to an administrative proceeding that ended in a summary judgment on the affirmative defense of Respondent Florida Power Corporation (the "employer") that petitioners' claims were barred because they "acted with reckless disregard of whether a violation . . . would occur" (App. 35). Because there was no evidentiary hearing, petitioners were denied due process by the court of appeals' failure to review the summary judgment on a de novo basis. This would have revealed the existence of conflicting evidence and triggered their rights as Americans to have their day in court to confront their employer's accusations and give the fact finder a first-hand opportunity to observe their demeanor and credibility.

The administrative law judge ("ALJ") never determined that petitioners acted with reckless disregard of whether a violation of nuclear regulations would occur. Instead, he applied an erroneous test (later rejected by the Board) which included no determination concerning

petitioners' state of mind. However, the ALJ did determine that the "irrefutable facts" established:

- Petitioners "were concerned that Curve 8 . . . was invalid" and their concerns "were serious." Fields "believe[d] catastrophic events could happen[.]" "Weiss believed there was a potential for catastrophe at the plant[.]" "Stewart states the potential for catastrophe was that crews were operating in a region where a LOCA [loss of cooling accident] could occur[.]" (App. 42).
- Petitioners believed "they had a duty to verify a critical safety issue" (App. 42).
- "The intent [of the evolutions] was to give [the employer's engineering department] data that would convince them that there was a problem with the curve" (App. 44).
- Petitioners testified that they used a "routine procedure" which "was clearly within [their] authority to perform[.]" Fields testified that the evolutions were "within OP-402, a pre-approved procedure." (App. 45).
- Petitioners "did not know, at the time of their acts, that Curve 8 was a design basis." (App. 46).

The ALJ's determinations have been reviewed by Respondent U.S. Department of Labor Administrative Review Board (the "Board") and the U.S. Eleventh Circuit Court of Appeals – neither of whom rejected any of the "irrefutable facts." Indeed, the Board's final order further found that petitioners "believed that the planned evolution comported with existing procedures and was within their authority to perform" (App. 13), "did not know that

[Curve 8] was a design basis that should never be exceeded" (App. 14-15), were advised by the employer that Curve 8 was "a conservative operating curve *and there is no violation if such a curve is exceeded by a small amount*" (App. 33), and did not know that their acts would cause a violation (App. 33). The court of appeals similarly held that petitioners "contend that they believed the tests complied with existing procedures and were within their authority to perform" (App. 3). Nonetheless, both the Board and the court of appeals are satisfied that petitioners' claims should be summarily denied on the grounds that they "acted with reckless disregard of whether a violation . . . would occur"

In its decision below, the court of appeals made at least two fatal errors. First, the court mistated the record reporting that the decision below was reached "[a]fter an evidentiary hearing" (App. 4), when in fact, there was no such hearing. Second, perhaps as a result of the first error, the court mistakenly reviewed the decision below utilizing the "substantial evidence" standard of review applicable to determinations reached by evidentiary hearing, instead of the "de novo" standard of review applicable to determinations reached by summary judgment. In their briefs in opposition to the petition for writ of certiorari, the Board and the employer have taken completely different approaches, but both essentially request this Honorable Court to ignore petitioners' constitutional guarantee to due process.

Buried deep in the footnotes of the Board's brief are the Solicitor General's acknowledgements that the Board conceded below "that the court of appeals should review the Board's decision de novo" (Board's Brief at p. 7, n. 2),

and that the court of appeals made a "mistaken reference in its description of the proceedings to an 'evidentiary hearing' before the ALJ" (Board's Brief at p. 11, n. 5). Notwithstanding these fatal errors, the Solicitor General attempts to resuscitate the decision below by suggesting that "An agency's use of general summary judgment standards does not necessarily require a reviewing court to apply the same de novo standard that would apply in reviewing the summary judgment of a court" and that an appellate court may give "deference to an agency's determination concerning whether there is a 'genuine issue of material fact[.]' " (Board's Brief at p. 11-12). These suggestions are internally inconsistent and fundamentally flawed.

This Honorable Court and others have held that agency summary judgment regulations should be construed in the same manner as Federal Rule of Civil Procedure 56. *See, e.g., Agosto v. Immigration and Naturalization Service*, 436 U.S. 748, 756-758 (1978); *Puerto Rico Aqueduct & Sewer Authority v. U.S. Environmental Protection Agency*, 35 F.3d 600, 607 (1st Cir. 1994); *John D. Copanos & Sons, Inc. v. FDA*, 854 F.2d 510, 523 (D.C. Cir. 1988). The summary judgment procedure established by Rule 56 does not offend the Due Process Clause because it is subject to the safe guard of de novo review, through which appellate courts ensure that the non-moving party will have his "day in court" when a lower tribunal precipitously concludes there are no genuine issues of material fact requiring a trial to resolve. *Cf. Jackson Tool & Die, Inc. v. Smith*, 339 F.2d 88 (5th Cir. 1964) (requirement that summary judgment can be granted only if there is no genuine disputed issue of material fact must be "strictly

construed" to insure that factual issues will not be determined without benefit of truth-seeking procedures of trial). The Solicitor General provides no citation of authority or any explanation why, as a matter of public policy or otherwise, a summary judgment entered by an administrative tribunal should not be subject to the same careful and strict level of appellate review applicable to a summary judgment entered by a learned federal district court judge who is sworn to "faithfully and impartially discharge and perform all duties incumbent upon [him or her] . . . under the Constitution and laws of the United States." *See*, 28 U.S.C. 453 (Oaths of Justices and Judges).

Administrative tribunals, like the Department of Labor's Administrative Review Board, are established for the purpose of providing people with due process, not depriving them of it. As noted by one appellate court:

> The Congress has conferred upon the Secretary of Labor great power in admitting or excluding aliens. But this power must be exercised fairly and in good faith with an earnest effort to discover the truth in accordance with the traditions and principles of free government, applicable where the fundamental rights of men are involved, and in accordance "with the fundamental principles of justice embraced within the conception of due process of law."

U.S. ex rel. Schachter v. Curran, 4 F.2d 356, 358 (3d Cir. 1925), *citing Tang Tun v. Edsell*, 223 U.S. 673 (1912). Although *Schachter* involved the rights of a deported alien, it should go without saying that the Department of Labor may not wield its other "great powers" with any less fairness or good faith when adjudicating the claims

of American citizens. In this case, however, that point must be underscored.

The Solictor General also suggests that "deference" should be afforded to the agency's interpretation of the phrase "genuine issue of material fact" (Board's Brief at 12). Presumably, this suggestion is rooted in the well-settled construction principle that provides when a statute or regulation is fairly susceptible to conflicting interpretations, the construction adopted by the agency charged with its administration is entitled to deference. *See, e.g., Train v. NRDC*, 421 U.S. 60 (1975). That construction principle has no application to the phrase "genuine issue of material fact" because it is a phrase crafted, and widely understood, by the judiciary and is not susceptible to different meanings. If anything, deference should be given to the Board's concession below that its summary judgment was subject to de novo review.

Unlike the Solicitor General's brief, the employer's brief fails to acknowledge that, contrary to the court of appeals' belief, there was no evidentiary hearing, and fails to mention that the Board conceded its summary judgment is subject to de novo review. Instead, the employer contends that (a) the de novo standard does not apply to appeals of summary judgments entered by administrative tribunals; (b) petitioners have brought a "run-of-the-mill claim," and (c) petitioners have failed to "present compelling policy arguments or issues of national interest." These contentions are incorrect.

In support of the proposition that the de novo standard does not apply, the employer relies upon *Macktal v. Dept. of Labor*, 171 F.3d 323 (5th Cir. 1999), *Billings v. Dole*,

923 F.2d 854 (Table) No. 90-3633, 1991 WL 7088 (6th Cir. Jan. 25, 1991), and *Doolin Security Savings Bank v. FDIC*, 53 F.3d 1395 (4th Cir. 1995). This reliance is misplaced.

Unlike the case at bar, the decision in *Macktal* was based upon "a hearing on the merits". *Id.*, 171 F.3d at 326. Prior to that hearing, the employer had moved for summary judgment, and several months after the hearing, the ALJ entered a recommended decision and order granting the employer's motion for summary judgment. However, exceptions were filed and the Board's final decision and order ultimately dismissed the employee's complaint on the grounds that he had not engaged in protected activity. *Id.* The *Macktal* decision does not reveal whether the Board's final order approved or rejected the ALJ's recommendation concerning the employer's motion for summary judgment. However, the decision does hold that the agency's interpretations of law "are reviewed de novo." *Id. Macktal* rejected that portion of the agency's final decision which held that the employee's written expression of intent to file a complaint with the Nuclear Regulatory Commission constitutes "protected activity" entitling the employee to whistle-blower protection. *Id.*, at 328. However, the *Macktal* court also concluded that the employee failed to present prima facie evidence that his protected activity was the likely reason for adverse action by his employer. *Id.*

Contrary to the employer's arguments sub judice, *Macktal* does not hold that a summary judgment entered by an administrative tribunal must be affirmed if it is supported by substantial evidence. At best, the *Macktal* court held that the employee did not present a prima facie case for relief. This is far from the situation sub

judice, where the agency below concluded that the evidence conclusively established the employer's affirmative defense.

Billings is also unavailing. In that case, an employee's complaint was dismissed on the grounds that it was filed outside of the 30-day time limit imposed by 42 U.S.C. 5851(b)(1). The dismissal was affirmed "because it is supported by substantial evidence *and is in accordance with law.*" *Billings*, 1991 WL 7088 at p. 1. Unlike the case at bar, there was no conflicting evidence concerning the employee's state of mind.

In *Doolin*, the appellate court affirmed a summary judgment granted by an administrative tribunal. However, the appellant "admit[ted] to the material facts that supported the Board's conclusion that [it] had committed a violation warranting the termination of its insured status." *Id.*, 53 F.3d at 1395. In the case at bar, the "irrefutable facts" show that petitioners believed in good faith that their actions were authorized.

In any event, if *Macktal*, *Billings*, and *Doolin* can be read to hold that an administrative tribunal's summary judgment must be affirmed if it is supported by substantial evidence, then those cases, like the decision below, establish dangerous precedent which significantly erode the Due Process Clause.

The employer also relies on the standard of review set forth in the Administrative Procedure Act, which provides that the Board's decision may only be reversed if it "is unsupported by substantial evidence or if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (Employer's Brief at p. 6,

12-13). This reliance is misplaced because the Board's decision was not "otherwise . . . in accordance with [the] law" governing summary judgments. Contrary to the law governing summary judgments and contrary to the Due Process Clause, the Board (and the court of appeals) deprived the petitioners of a trial on the conflicting evidence of whether they acted with reckless disregard.

The employer has the arrogance to contend that petitioners have advanced a "run-of-the-mill claim" that fails "to present compelling policy arguments or issues of national interest." If our system of justice and the interest of our nation have reached the point where an administrative tribunal is permitted to summarily adjudicate a citizen's claim on disputed material facts without a trial, and that result can be characterized as "run-of-the mill," then this is indeed a sad day, not just for the petitioners, but for all Americans.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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